

***United States Court of Appeals
for the Second Circuit***



APPENDIX

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74-2431

JOINT APPENDIX

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

B

No. 74-2431

CIVIL AERONAUTICS BOARD,

Appellee,

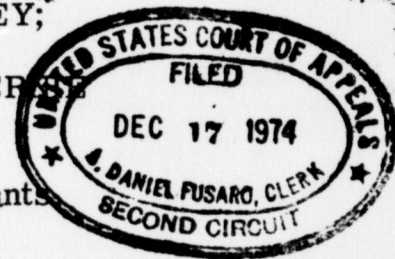
v.

CAREFREE TRAVEL, INC., VACATION
VENTURES, INC., and DORAN JACOBS;

SURREY INTERNATIONAL TRAVEL, INC.,
ESTHER ZETLIN and JACK GORCEY;

ERNIE PIKE ASSOCIATES, LTD., ER
PIKE and HENRY ZETLIN,

Appellants



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ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

6

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CHRONOLOGICAL LIST OF RELEVANT
DOCKET ENTRIES

<u>Item</u>	<u>Date</u>	<u>Page</u>
Order of Reference	July 22, 1974	1
Magistrate's Report	August 27, 1974	2
Opinion of Judge Judd	September 30, 1974	26
Amended Preliminary Injunction	October 15, 1974	84

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JA-1

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

CIVIL REPARATION BOARD, : 74-C-915
 :
 plaintiff, :
 :
 - against - :
 :
 SCOTTISH-AMERICAN ASSOCIATION, INC., : ORDER
 et al., : OF
 : REFERENCE
 :
 defendants. :
 :

The court having commenced hearing testimony on plaintiff's motion for a preliminary injunction, and it appearing that even the testimony appropriate on such a motion cannot be heard during the intervals of criminal trials of defendants in custody, and the court finding that exceptional circumstances exist which require a reference to a master, it is

ORDERED that the issues arising on plaintiff's motion for a preliminary injunction are referred to HON. VINCENT A. CATONISIO, United States Magistrate, pursuant to F.R.Civ.P. 53(b) and 23 U.S.C. § 636(b) (1); and it is further

ORDERED that the magistrate shall file a report relating to as many defendants as possible on July 29, 1974; and it is further

ORDERED that argument on the confirmation of the report be heard before the court on July 30, 1974 at 3:30 p.m. in Courtroom 11; and it is further

ORDERED that the court may modify or supplement this order of reference as justice may require.

Dated: Brooklyn, New York
July 28, 1974

/s/ _____
CLERK OF COURT
UNITED STATES DISTRICT COURT

TO THE HONORABLE THE JUDGES OF THE UNITED STATES DISTRICT
COURT FOR THE EASTERN DISTRICT OF NEW YORK

-----X

CIVIL AERONAUTICS BOARD *1/
Plaintiff

Civil Action No.
74 C 915

- against -

SCOTTISH-AMERICAN ASSOCIATION,
INC., et al.

Defendants

-----X

THE REPORT OF UNITED STATES MAGISTRATE VINCENT A. CATOGGIO
ACTING AS SPECIAL MASTER UNDER F. R. CIV. P. 53 PURSUANT
TO THE ORDER OF HONORABLE OHRIN G. JORD DATED JULY 22, 1974
RESPECTFULLY SHOWS AS FOLLOWS:

INTRODUCTORY STATEMENT *2/

The United States Civil Aeronautics Board,
hereinafter referred to as CAB, seeks to restrain what
it alleges to be the unlawful sale of air transportation

* 1/ Attached hereto is a photostatic copy of the title
of this action as used in the complaint. Defendants against
whom the suit is terminated, are designated by an "X".

* 2/ The Government says at p. 2 of its brief herein:

"This Action is a sequel to
Civil Aeronautics Board v.
Aeromatic Travel Corp.,
(and a number of other Travel Agents)
489 F. 2d 251 (CA 2-1974)

which is pending on remand. That decision held that even
though CAB could issue its own orders and punish for dis-
obedience, it also has been given power by Congress to
invoke the processes of our courts in enforcing its regu-
lations, orders and the law. (49 U. S. C. §1467).

The court summed up the question involved when it
said at page 254:

"Do the facts as found regarding the
operations of the appellees, make them subject to the
Board's powers to regulate air carriers."

on so called affinity charter flights. The defendants originally were twelve legal entities and nineteen individuals who it is alleged, act through them or on their behalf. The CAB seeks preliminary and permanent injunctions prohibiting each defendant from acting as an indirect air carrier 29 U. S. C. §1301(3) or an indirect foreign air carrier 49 U. S. C. §1301(19) without first obtaining a certificate of public convenience and necessity or a foreign air carrier permit.

Consent decrees having been entered against defendants named in the caption herein now leave eight corporations and eleven individuals as surviving defendants. They are:

Carefree Travel, Inc.
Vacation Ventures, Inc.
Doran Jacobs
Farragut Holidays Corp.
Jerome H. Lennard
Nationwide Leisure Corp.
Stuart Graff
Surrey International Travel, Inc.
Eastern Sportsmen's Club, Inc.
Gerald Kurtz
Irving Snow
Ernie Pike Associates, Ltd.
Ernie Pike, Individually
Henry Zetlin
Esther Zetlin
Jack Gorcey
Gil International Tours, Ltd.
Edward Gil

As to the individuals named, reference to the caption will indicate that most are sued as individuals and as officers of corporations for whom they act.

The motion of Overseas National Airways Inc., for leave to participate herein as amicus curiae in these proceedings was granted by Judge Orrin Judd on July 30, 1974. Other certified supplemental carriers, namely, Capital International Airways, Saturn Airways Inc., and Transinternational Airways, Inc., who claim to be in a similar position to ONA applied herein for leave to join with ONA as amicus curiae in this action, and a brief on behalf of all amici curiae has been filed herein.

RECOMMENDATION

In the judgment of the undersigned, the evidence thus far presented herein does not justify or permit the issuance of a preliminary or temporary injunction at this time. That is not to say that if the plaintiff properly uses its subpoena and investigative powers (49 U. S. C. §§1354, 1482) it will not ultimately be able to submit adequate proof to warrant issuance of the injunction against at least some of the defendants which it now seeks. CAB has not yet proved facts which make any or all of the defendants indirect air carriers subject to regulation by the Board. When and if CAB proves in detail the activities

of one or more defendants, including but not limited to arranging charter flights, soliciting the public and selling to the public and generally acting as an entrepreneur, in violation of 49 U. S. C. §§1371(a) and 1372(a), those who are indirect air carriers will be more readily identifiable. I do not believe that the sale by a defendant of a single ticket in violation of the law should stamp that defendant as an indirect air carrier. CAB's proof herein of isolated sales of tickets for air transportation on charter flights did not establish a regular course of conduct. No conspiracy among the defendants was charged or proved and the hearsay and conclusions contained in affidavits submitted by CAB can not take the place of direct proof of habitual and regular misconduct by defendants. CAB's effort to prove a case by cross examining officers of defendant corporations was markedly futile since these witnesses were primed for the attack and successfully parried every thrust.

Had CAB submitted proof, which it unfortunately did not, to support its suspicions, surmise and conjecture, the undersigned would not hesitate to recommend the issuance of a temporary injunction. Lacking such proof it appears that the requirements for a temporary injunction as set forth by the Second Circuit Court of Appeals on August 13, 1974 in

Gresham v. Dr. George Chambers, et al.

Docket No. 73 -2733

and cases therein cited have not been met.

THE GRAVITIES OF THE COMPLAINT

The complaint herein charges in paragraph

"28. Defendants SCOTTISH-AMERICAN, TAM, TAA, PROFESSIONAL, GERMAN, CAREFREE, FARRAGUT, NATIONWIDE, SURREY, EASTERN, PIKE LTD., and GIL LTD., and each of them, buys and sells charter air transportation for its own account, acting as an independent entrepreneur or principal rather than as an agent of a direct air carrier. Pursuant to that course of conduct, each of these defendants holds out and sells air transportation at prices fixed by it for affinity charter flights between certain points in the United States, usually New York, and points in other states and/or countries to individuals not eligible for such transportation, providing such ticket purchasers in many cases with membership documents in the chartering organization in connection with, and for the purpose of, the sale of such air transportation to them. In so doing each defendant acts as an indirect air carrier without a certificate of public convenience and necessity, or an indirect foreign air carrier without a permit, and violates 49 U. S. C. §§1371(a) or 1372(a)."

Paragraph 30 makes similar allegations as to the individual defendants.

Paragraph 33 alleges:

"33. The defendants, and each of them, arrange for, offer to sell and sell, directly or through agents, what purports to be "pro rata" or "affinity"

charter air transportation (hereinafter "affinity charters") between certain points in the United States, usually New York, and points in other states and/or countries to the general public, contrary to those Civil Aeronautics Board Regulations governing such charter air transportation, in violation of their duty pursuant to 49 U. S. C. §1485(e) to comply therewith including, but not limited to, Economic Regulations prohibiting:" such conduct as is set forth in 14 CFR.

THE FORM OF THE PROOFS

On June 19, 1974 this Court issued an order requiring the defendants to show cause why the preliminary injunction asked for by the plaintiff should not issue. Voluminous affidavits to which were attached exhibits were filed in support of this order.

Before argument of the motion was heard, several of the defendants made motions to dismiss the complaint for what they called deliberate misjoinder of too large a number of unrelated defendants in the same action and for failure to join additional parties such as airlines, hotel owners and travel agents, who had not been made parties. Some defendants also demanded a jury trial on the application for a preliminary injunction. All of these motions

- 7 -

were denied. Finally on July 19, 1974 oral testimony first was heard and prior to that the defendants were directed to file answering affidavits and to produce persons for CAB to examine as adverse witnesses. Such answering affidavits were filed by all defendants except Nationwide Leisure Corp. Thus the plaintiff's application for a preliminary injunction is based on affidavits with exhibits attached thereto as well as oral testimony given by the several witnesses in open court. Stenographic minutes have been taken and these are being filed in the office of the Clerk of this Court together with this report.

THE PLAINTIFF'S CONTENTIONS

In its brief submitted in support of its motion for a Preliminary Injunction, CAB says at p. 6:

"B. Facts of this Case. The facts of this case are disclosed in the Board's affidavits filed herein, and the various exhibits thereto. The defendant entities fall into at least two different categories.

A number of the defendants, such as Scottish-American Association, Inc., Turkish American Mediterranean Association, Inc., and Turkish American

Association for Cultural Exchange are set up as not-for-profit corporations and are in the guise and form of a club of one sort or another; they have varying degrees of resemblance to ordinary social clubs and some may even have primarily existed as such some time ago. It is believed that these "clubs" act both as "wholesalers", contracting out at a mark-up large groups of seats on aircraft they charter, and as "retailers", selling their own charters directly to the public or sometimes selling individual tickets to people on the flights of other wholesalers. In the case of these "club" defendants, the "club" -- frequently under common control with a travel bureau of some kind -- would make the prospective passenger an instant "member" of itself thereby providing a cloak of legitimacy to its operations. In the case of at least some defendant entities, the "club" merely adds the passenger's name to a permanent mailing list for solicitation on future flights. These so-called "clubs" are really in the travel business and exist for the purpose of chartering aircraft -- all other activities are either ancillary or cosmetic or both.

The second group of defendants, such as Farragut Holidays Corp., German Overseas Tours, Inc., Carefree Travel, Inc., Vacation Ventures, Inc., Nationwide Leisure Corp., Ernie Pike Associates, Ltd., Surrey International Travel, Inc., and Gil International Tours, Ltd., are not "clubs" themselves, but use "clubs" (which may or may not be fictitious) to conduct affinity charter flights. Vis-a-vis the promoter's operation, the sole

function of these "clubs" is to provide a name on a charter contract to enable passengers to be placed on affinity charter flights in the "club's" name. Such promoters sometimes will give their passengers appropriate "membership" documents in the chartering "club", either directly or through other travel agents operating at a mark-up or on a percentage commission basis paid by the promoter. As with the "clubs", however, such promoters will frequently operate as retailers for other organizations as well as for themselves.

The individual defendants act through or on behalf of the defendant entities with respect to the activities alleged in the complaint."

CONTENTIONS OF DEFENDANTS AND AMICI CURIAE

The defendants deny that they are indirect air carriers and vehemently deny the conclusions which CAB draws from what appear to be almost admitted but isolated violations of the law by some or all of the defendants. They firmly deny that a preliminary injunction legally is permissible.

Amici Curiae make three arguments against issuance of a preliminary injunction.

1. Since the defendants arrange more than 50 affinity charters a week each involving approximately 244 passengers a sudden shut down would be calamitous to the public.

2. It is difficult if not impossible to enforce CAB regulations which amici have petitioned both the Congress and CAB to change.*^{3/}

3. The legal requirements for issuance of a preliminary injunction have not been met.

*^{3/} The Director of Enforcement and Chief Legal Officer of CAB who testified in these hearings, did not seem to generate enthusiasm for the CAB Regulations when he was asked

"You are familiar with your own rules and regulations, are you not?" and he answered

"To a greater or lesser degree depending on the rule". (Gingery 506)

This witness admitted the accuracy of the quote in Travel Weekly Perspective when he said that Air Carriers

". . . Warrant the fact to the Board on their honor that the affinity passengers they are carrying are being carried in accordance with Board regulations . . . In my view we should exhaust the ability of the carriers to fulfil their responsibilities before we attempt to solve this problem by concluding that they are unequal to it". (Gingery 562)

- 11 -

THE DANGER TO THE PUBLIC

Substantial reason exists to believe that the plaintiff has brought to light herein a situation which presents a real threat of serious danger and damage to that segment of the American public which is misled into travelling by air on what are commonly called charter flights coupled with package deals arranged by the defendants or those conducting operations comparable to those of these defendants.

Marked in evidence by the defendants as exhibit 10 is a letter from TWA Manager of Passenger Sales to Surrey International Travel Co., one of the defendants herein and it reads in part:

"Recent information that I received, which I discussed with you, indicates the signatures of the charter organizer on the Statement of Supporting Information for the Knights of Pythias departure of February 14, 1974, and the Kings Point Academy Alumni Association departure of February 17, 1974, may be questionable. In addition, the telephone check call system that we instituted to determine the charterworthiness of individual passengers manifested has not always been successful in detecting non-members".

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- 12 -

Then follow three requirements which TWA insists should be followed after which it is said:

"I am disturbed that we have to go to these extremes to verify the charter worthiness of this program, however, I feel these steps are necessary in view of recent occurrences."

Thus ample reason exists to suspect flagrant and wide spread violations of the law. In order to protect the American public have been committed in the recent past by "package tour companies" who insist as the defendants do, that they are not subject to the Civil Aeronautics Law or the Jurisdiction of the Civil Aeronautics Board. There is little if any evidence that these practises have ceased or even abated to any appreciable extent.

Mr. Gingery, Chief Enforcement Officer of CAB testified that 37 per cent of passengers on affinity flights were ineligible according to one survey and 46 per cent according to another. This does not include cases of fictitious or faked charters. Nor has any defendant been tied in directly with any of these statistics.

During the course of hearings herein, the Defendant, Scottish American Association defaulted on air transportation it had arranged for approximately two thousand travelers according to reports. Again on

- 13 -

August 17, 1974 50,000 British travelers were stranded all over the world by the collapse of Court Line, Britain's biggest package-tour company according to reports in the New York Times a copy of which is hereto attached. In the instant case it was said that Pan Am alone grosses 60 Million Dollars a year from Charter flights and this emphasizes how widespread and big the operation is and how necessary it is to police such an industry.

It is easy to see that without supervision and regulation today's payments by the public for air transportation a month from now could be used to pay air carriers for flights to be completed tomorrow in a manner akin to kiting of checks. If today's receipts are used to pay yesterday's obligations, the greater will be the risk of insolvency be. As long as tour operators are free from restraint and regulations of any kind, it would appear that they are entirely free to use funds entrusted to them by or for the account of the public, in any manner they may wish.

COMMENT

By joining together a large number of defendants and by relating in bulky affidavits with exhibits attached a considerable amount of hearsay, CAB has spread a heavy veil of suspicion over all of the defendants collectively

- 14 -

as a group. Consciousness that each defendant is entitled individually to his day in court has compelled the exercise of the most meticulous care in weighing plaintiff's proof separately as against each defendant.

FINDINGS OF FACT

1. Each of the corporations which survive as defendants herein is incorporated and as of the time of the filing of the complaint herein maintained an office as alleged in the complaint.

2. The individuals named as defendants herein, as of April 1974, were officers of corporations as alleged in the complaint and they acted through or on behalf of the said corporations as alleged except as to the defendants Shapiro, Snow and Kurtz. As to the defendant Shapiro as of December 1973 he acted through and on behalf of Ernie Pike Associates and Eastern Sportsmen's Club (Affidavit - Rita Collins - Par. 4) but not thereafter.

3. Eastern Sportsmen's Club Inc., on April 9, 1974 accepted two checks one for \$175.00 for air transportation and the other in the sum of \$10.00 for annual dues in Eastern Sportsmen's Club, from George S. Minichiello a special agent of the Civil Aeronautics Board. The person who took the checks at Eastern's Office at 310 5th

- 15 -

Avenue, left the office and returned in a few minutes giving to Minichiello a TWA ticket covering a round trip - New York to Las Vegas April 11, April 14 made out to G. Minichiello, bearing the words on the outer cover "charter ticket" and reading inside "Suburban Sporting Club, Inc., (name of charterer)". Minichiello was told by the attendant Sharon, that he should say he was a member of the Suburban Sporting Club since 1973 and he was given a membership card in that club. Ernie Pike Associates Limited maintains offices next door at 308 5th Avenue. (Minichiello Affidavit Par. 6, 7, 8, 9, 10, 11).

4. Farragut Holidays Corp., 551 5th Avenue on April 10, 1974 accepted \$308 from George S. Minichiello for a round trip air flight to Athens and return without any ground package, with a departure of April 27 and return on May 5, 1974 on Saturn Airways Inc. He was given a receipt and a few days before the flight he received a letter with pre flight instructions but at no time was he given an air transportation ticket. By presentation of the letter at check-in prior to flight, he was given a Saturn Airways ticket.

5. Carefree Vacation Ventures, 30 West 57th Street on April 10, 1974 accepted payment of \$160.00 from George S. Minichiello for a return flight to Las Vegas, Nevada, May 2, May 5. He received by mail (in a Carefree envelope exhibit 29) a tour membership card evidencing

- 16 -

accommodations on Capital Air Lines Flight No. 150 May 2, 1974 departing Kennedy. When Min'chiello checked in at Capital Airways his name was on the plane's manifest.

6. Nationwide Leisure Corp., 207 East 45th Street refused sale of a single ticket to Minichiello. He went to Liberty Travel Agency, 152 West 42nd Street where he gave them a check for \$290.00 for a return flight to the Canary Islands. When he did not receive his ticket he inquired of Liberty and was directed to Nationwide's office at 207 East 45th Street where he called and was furnished with an envelope containing the flight itinerary and some Nationwide Leisure baggage tags (exhibit 49) together with a statement that he was a member of the employees of New York City Board of Education. On the night of May 17th Minichiello checked in for Capital Airways Flight No. 086 on the north passenger terminal at John F. Kennedy International Airport bound for the Canary Island and the only identification he produced on boarding was his passport. He was given a Capital charter flight ticket and a passenger boarding pass (exhibit 50). The ticket indicated the charterers to be Gastronomical Association of Pennsylvania and Employees of NYC Board of Education.

7. Ernie Pike Associates Ltd. and Gil International Tours Ltd., operate closely together although they are separate entities. Rita Collins employed at Pike Associates from April to December 1973 in an affidavit

- 17 -

stated that she prepared membership for passengers in spurious organizations which were supposed to be charterers. Henry Shapiro directed the activities of Eastern Sportsmen's Club and Pike Associates during this time according to Miss Collins.

8. A TWA flight January 21, 1974 ostensibly was chartered to the Knights of Pythias (Affidavit of Paul Wallig exhibit 5) for an "affinity" group. The travel agent is named as Surrey International. It was presumably signed by Jack Hausberg. Examination of the membership roster of the Knights of Pythias and interrogation of officers of that organization failed to uncover any affirmation of the charter by the Knights of Pythias or the existence of a Jack Hausberg. (Affidavit Par. 8).

CONCLUSIONS

1. Hearsay evidence contained in Affidavits submitted herein by CAB may not be considered in connection with CAB's prayer for a preliminary injunction.

2. All of the surviving defendants with the possible exception of Snow and Kurtz, have been guilty at one time or another of serious violations of CAB rules, regulations and statute laws.

- 18 -

3. No adequate proof has been submitted to support the conclusion that any of the surviving defendants personally, presently and systematically is violating the CAB rules, regulations and statute laws.

4. Upon submission by CAB of proof establishing the facts alleged in paragraphs 23 et seq., of the complaint against any defendant, that defendant thereupon will be established to be an indirect air carrier

5. Any defendant who is established to be an indirect carrier is subject to the jurisdiction of the Civil Aeronautics Board and his or its conduct thereafter must be governed by its rules and regulations.

6. Civil Aeronautics Board has jurisdiction over any indirect air carrier.

PROPOSAL

CAB itself must enforce the law and its rules. It is unrealistic for CAB to expect the air carriers to police the Travel Agent industry as CAB's chief of enforcement officer indicated (Gingery 562). CAB very simply could direct all air carriers to report within 48 or 72 hours with details, the signing of any and all charters

- 19 -

for air transportation which are executed by affinity groups. CAB thereupon could investigate the authenticity of such charter organization. If the charter group is found to be a fake, as CAB insists happens so often, criminal prosecution of those involved including the Travel Agent, easily could follow. Passengers emplaning on an affinity charter flight could be required to produce a certificate of membership in the chartering organization in which is stated the place where the central membership list showing the date when each person became a member is kept as required by 14 C. F. R. 207.41. Spot checks of membership certificates against membership rolls could be made periodically or regularly as CAB might see fit.

It seems that as soon as CAB makes known that it will employ those powers which Congress has given it to put an end to the practises of which it makes complaint herein there will be a sudden, marked and continuing change for the better to such an extent that further prosecution of this suit will become wholly unnecessary.

CAB's expectation that airlines will enforce rules, regulations and the law to the detriment of Travel Agents, the hand that feeds them, is unrealistic to say the least. Competition between airlines for passengers will not add zest to law enforcement efforts of airlines. It would also seem that we should not disregard the possibility of unholy and sinister alliances between dormant personnel in airlines and travel agencies.

- 20 -

In its brief in support of its motion for a preliminary injunction, CAB indicates that illicit affinity charters not only undermine the air carriers but also siphon vast sums of money from the public to middlemen who are not subject to any control. If the cost of an affinity charter flight is properly pro rated among the passengers, the cost per head is far less than an airline would collect for the same flight on a regularly scheduled flight. CAB claims that those who arrange illicit affinity charter flights do not pro rate the cost but make a charge per ticket far in excess of the pro rata cost, although less than the scheduled rate. Thus the public derives what appears on its surface to be a benefit, the middleman does extremely well for himself but the airlines become big losers.

The request of Pan Am for a 10 Million Dollar a month subsidy from our government as reported on the front page of the August 24, 1974 issue of the New York Times, seems to indicate that the cheap rates the American public gets as the result of illicit affinity charters is a pyrrhic victory.

It seems that if CAB made it clear to Airline Carriers and Travel Agents alike that no more "phony" affinity charters would be tolerated and if it followed up its announcement with appropriate action, the evil of which CAB complains herein could be eliminated suddenly and effectively. Until CAB does so the propriety of

- 21 -

granting it an injunction of any kind herein would be highly questionable.

Dated: Brooklyn, New York
August 27, 1974

Respectfully submitted,

Vincent A. Catoggio
UNITED STATES MAGISTRATE
Eastern District of New York

Filed herewith are the exhibits of Eastern Sportsman's Club, Inc., in evidence numbered 1, 2, 4 to 10, 11 to 19 and those of Surrey International Travel Inc., in evidence numbered 1, 2 and 3.

THE NEW YORK TIMES, SATURDAY, AUGUST 17,

Collapse of Company in Britain Strands 50,000 Tourists Abroad

LONDON, Aug. 16 (Reuters) — Angry vacationers crowded a British airport today as a huge effort got under way to rescue 50,000 other tourists stranded around the world by the collapse of Court Line, Britain's biggest package-tour company.

The \$45-million cost of the shift is being paid out of deposit funds held according to Government rules by Court Line with the British Association of Travel Agents. Airlines and other tour companies will provide the planes.

But many thousands of tourists, most of them British, will not get their money back as a result of Court Line's financial collapse, which was announced last night. Some tourists still in Britain paid for their tours as late as yesterday afternoon.

Today at Luton airport, north of London, thousands of tourists who arrived for flights to continental resorts were told to go home.

Twenty rescue flights were being made today by five airlines.

Court Line's largest subsidiary, Clarksons Holidays, has tourists scattered across 75 continental resorts. Another company, Horizon, has travelers in 22 countries.

At least 100,000 people have already paid for Court Line vacations scheduled through the end of next month.

At the London offices of Clarksons, a cordon of policemen prevented angry tourists from bursting into a directors' board meeting.

Women screamed at the directors to come out and explain why the company was still taking large sums of money from would-be tourists at 6 P.M. last night

when Court Line was on the verge of collapse.

An official receiver was appointed by the High Court tonight to direct the winding up of Court Line's financial affairs.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

CIVIL AERONAUTICS BOARD,

Plaintiff,

- against -

- X SCOTTISH-AMERICAN ASSOCIATION, INC.,
- X TRAVEL-A-GO GO, INC.,
- X FRANCIS JOHN FOLAN a/k/a FRANKIE ROSS,
Individually and as Officer, Agent,
Servant or Employee of, and d/b/a
SCOTTISH-AMERICAN ASSOCIATION, INC.
and TRAVEL-A-GO GO, INC.,
- X JULIA ANN FOLAN, Individually and as
Officer, Agent, Servant or Employee
of, and d/b/a SCOTTISH-AMERICAN
ASSOCIATION, INC. and TRAVEL-A-GO GO, INC.,
- X TURKISH AMERICAN MEDITERRANEAN
ASSOCIATION, INC.,
- X SAHIR TANHAN, Individually and as Officer,
Agent, Servant, or Employee of, and d/b/a
- X TURKISH AMERICAN MEDITERRANEAN ASSOCIATION,
INC.,
- X ORHAN ERENLER, Individually and as Officer,
Agent, Servant or Employee of, and d/b/a
- ✓ TURKISH AMERICAN MEDITERRANEAN ASSOCIATION,
INC.,
- ✓ YILMAZ ERIM, Individually and as Officer,
Agent, Servant or Employee of, and d/b/a
- TURKISH AMERICAN MEDITERRANEAN ASSOCIATION,
INC.,
- ✓ ATA ERIM, Individually and as Officer,
Agent, Servant or Employee of, and d/b/a
- ✓ TURKISH AMERICAN MEDITERRANEAN ASSOCIATION,
INC.,
- ✓ TURKISH AMERICAN ASSOCIATION FOR CULTURAL
EXCHANGE,
- ✓ FARUK TENICK, Individually and as Officer,
Agent, Servant or Employee of, and d/b/a
- ✓ TURKISH AMERICAN ASSOCIATION FOR CULTURAL
EXCHANGE,

COMPLAINT FOR
INJUNCTIVE RELIEF

Civil Action

No. 740915

✓ THE PROFESSIONAL & ALUMNI ASSOCIATION, INC.,)
✓ FRANK LATORRE a/k/a FRANK S. LATOR,)
Individually and as Officer, Agent, Servant,)
or Employee of, and d/b/a THE PROFESSIONAL &)
ALUMNI ASSOCIATION, INC.,)
✓ GERMAN OVERSEAS TOURS, INC.,)
CAREFREE TRAVEL, INC.,)
VACATION VENTURES, INC.,)
DORAN JACOBS, Individually and as Officer,)
Agent, Servant or Employee of, and d/b/a)
CAREFREE TRAVEL, INC., and VACATION)
VENTURES, INC.,)
FARRAGUT HOLIDAYS CORP.,)
JEROME H. LINNARD, Individually and as)
Officer, Agent, Servant, or Employee of,)
and d/b/a FARRAGUT HOLIDAYS CORP.,)
NATIONWIDE LEISURE CORP.,)
STUART GRAFF, Individually and as)
Officer, Agent, Servant or Employee of,)
and d/b/a NATIONWIDE LEISURE CORP.,)
✓ SURREY INTERNATIONAL TRAVEL, INC.,)
EASTERN SPORTSMEN'S CLUB, INC.,)
GERALD KURTZ, Individually and as Officer,)
Agent, Servant, or Employee of, and d/b/a)
EASTERN SPORTSMEN'S CLUB, INC.,)
IRVING SNOW, Individually and as Officer,)
Agent, Servant or Employee of, d/b/a)
EASTERN SPORTSMEN'S CLUB, INC.,)
ERNIE PIKE ASSOCIATES, LTD.,)
ERNIE PIKE, Individually and as Officer,)
Agent, Servant or Employee of, and d/b/a)
ERNIE PIKE ASSOCIATES, LTD.,)
HENRY ZETLIN, Individually and as Officer,)
Agent, Servant or Employee of, and d/b/a)
ERNIE PIKE ASSOCIATES, LTD.,)
HENRY SHAPIRO, Individually and as Officer,)
Agent, Servant or Employee of, and d/b/a)
ERNIE PIKE ASSOCIATES, LTD., and EASTERN)
SPORTSMEN'S CLUB, INC.,)
ESTHER ZETLIN, Individually and as Officer,)
Agent, Servant or Employee of, and d/b/a)
ERNIE PIKE ASSOCIATES, LTD., and SURREY)
INTERNATIONAL TRAVEL,)

JACK GORCEY, Individually and as Officer,
Agent, Servant or Employee of, and d/b/a
ERNIE PIKE ASSOCIATES, LTD., and SURREY
INTERNATIONAL TRAVEL, INC.,

GIL INTERNATIONAL TOURS, LTD.,

EDWARD GIL, Individually and as Officer,
Agent, Servant or Employee of and d/b/a
GIL INTERNATIONAL TOURS, LTD.,

Defendants.

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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CIVIL AERONAUTICS BOARD,

Plaintiff,

- against -

CAREFREE TRAVEL, INC., VACATION
VENTURES, INC. and DORAN JACOBS;

FARRAGUT HOLIDAYS CORP. and JEROME
H. LENNARD;

NATIONWIDE LEISURE CORP. AND
STUART GRAFF;

SURREY INTERNATIONAL TRAVEL Inc.,
ESTHER ZETLIN and JACK GORCEY;

EASTERN SPORTSMEN'S CLUB, INC.,
GERALD KURTZ, and IRVING SNOW;

ERNIE PIKE ASSOCIATES, LTD., ERNIE
PIKE, HENRY ZETLIN and HENRY SHAPIRO; and

GIL INTERNATIONAL TOURS, LTD. and
EDWARD GIL,

Defendants.

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Appearances:

HON. DAVID G. TRAGER
United States Attorney
Attorney for Plaintiff

By: JAMES D. PORTER, Esq.
Assistant United States Attorney
and

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September 30, 197

Appearances (continued):

RAYMOND D. DATTOCCHI, Esq.
JAMES W. TELLO, Esq.
Attorneys, Department of Justice
Of Counsel

PHILLIPS, NIZER, BENJAMIN, KRIM & BALLON, Esqs.
Attorneys for all Defendants except NATIONWIDE
LEISURE CORP. and STUART GRAFF

By: LOUIS NIZER, Esq.
PAUL MARTINSON, Esq.
JANET KANE, Esq.
Of Counsel

HOWARD POROS, Esq.
Co-counsel for Defendants Eastern Sportsmen's Club,
Inc., Ernie Pike Associates, Ltd., Gil International
Tours, Ltd., Surrey International Travel, Inc., and
individual Defendants Gil, Gorcey, Pike, Shapiro,
Snow, and Esther and Henry Zetlin

JOSEPH MARCHESO, Esq.
and
WALTER NATHAN, Esq.
Attorneys for Nationwide Leisure Corp. and Stuart Graff

BREED, ABBOTT & MORGAN, Esqs.
Attorneys for Overseas National Airways, Inc.,
amicus curiae

By: LOUIS A. MANGONE, Esq.
ROBERT E. WAGENFELD, Esq.
Of Counsel

J U D D, J.

MEMORANDUM OF DECISION

The Civil Aeronautics Board (C.A.B.) brought this action against 14 corporate defendants and 19 individual principals of the several defendants, for injunctive relief to prevent their selling airplane passage on charter flights which do not comply with C.A.B. regulations concerning affinity groups. Consent injunctions have been granted against six corporate defendants and eight individuals, leaving eight corporations and eleven individuals for consideration at this time.

Plaintiff's application for a preliminary injunction is now before the court for decision, after evidentiary hearings and a report on certain issues by United States Magistrate Vincent A. Catoggio. For the reasons stated below, the court will confirm the Magistrate's major findings of fact, but not his conclusions of law, and will grant an injunction against certain of the defendants, but with provisions less drastic than those requested by the C.A.B.

The Proceedings to Date

Plaintiff's Information Sheet pursuant to Rule 1 of this court's Individual Assignment and Calendar Rules described the case as related to Civil Aeronautics Board v. Aeromatic Travel Corp., 71 C 1232, which had been randomly assigned to this judge following the directions in the Court of Appeals' opinion dated December 12, 1973, 489 F.2d 251. This court did not exercise the right to return the case for reassignment, pursuant to Rule 2(d) of those Rules, as might have been done if it was erroneously assigned.

The motion for a preliminary injunction was commenced on June 19, 1974 by order to show cause, supported by affidavits and exhibits more than two inches thick. Louis Nizer, Esq. and Gerald A. Kearney, Esq. appeared a few days later at an informal conference and requested that the hearing date, set for June 28, 1974, be scheduled for one month later in order to enable the defendants to analyze the legal issues, investigate the facts fully, and prepare motions to dismiss the complaint for allegedly prejudicial misjoinder, or in the alternative, for a severance. Mr. Nizer appeared for an indefinite number of defendants, and Mr. Kearney appeared for Scottish-American

Association, Inc., which was the first defendant named in the complaint, and for two individual principals of that defendant. The court adhered to the scheduled hearing date of June 28, 1974 for those defendants whose counsel had not requested an adjournment, and fixed July 5 for defendants' motions and for cross-examination of the plaintiff's witnesses, and July 12, 1974 for testimony of defendants' witnesses.

On June 28, 1974 the C.A.B. submitted a default judgment against two of the original defendants, Turkish American Association for Cultural Exchange (T.A.A.) and Mr. Faruk Fenik, who had neither requested an adjournment nor appeared. Later that day, the court received a notice of appearance on their behalf from Mr. Nizer and determined not to sign the default judgment. However, the Nizer firm later withdrew, and a letter was filed on July 15, 1974 in which these two defendants agreed not to undertake any affinity charter transportation until after the determination of the merits of the complaint.

On July 5, 1974, Messrs. Nizer and Kearney were joined by Howard Boros, Esq., Joseph Marcheso, Esq. and Anthony Dilimetin, Esq. as co-counsel or substituted counsel

for various defendants. The court denied a motion to dismiss the complaint or to sever for prejudicial misjoinder, a motion to add unnamed airlines as indispensable parties, a motion for a jury trial, a motion to reassign the case to another judge, and a motion to certify the case to the Court of Appeals to review the denial of the other motions. The court proceeded to hear the direct testimony of the first C.A.B. witness, George S. Minichiello, a Special Agent in the Bureau of Enforcement, and the start of his cross-examination; his affidavit was accepted as direct testimony, after this court ruled on defendants' motions to strike various paragraphs in the affidavit as inadmissible hearsay. At the close of the hearing, the cross-examination of the first C.A.B. witness had not been completed. The case was adjourned until July 19, 1974 at defendants' request, and defendants were directed to submit affidavits by July 16, 1974.

On July 11, 1974, after a conference telephone call with counsel for plaintiffs and most defendants, the court granted the C.A.B.'s request to take depositions, and extended the defendants' time to file affidavits until July 19, 1974.

On July 18, 1974, the court granted immunity to two witnesses who were being deposed by the C.A.B., and who were principals of Liberty Travel Corp., one of the largest travel agencies in the country.

On July 19, 1974, consent orders against certain defendants were submitted and signed. Motions of the remaining defendants for partial summary judgment on count II of the complaint were argued and denied (See discussion below); the court then heard further cross-examination of the C.A.B. witness who had testified on July 5, 1974.

At the conclusion of the hearing, since the court would be engaged in a criminal jury trial the following week, the issues were referred to United States Magistrate Vincent A. Catoggio to hear and report. He had been present during the hearing, to obtain background on the case. The Order of Reference was signed on July 22, 1974, and requested a report by July 29, with hearing on confirmation set for July 30, 1974.

The order specified as grounds:

"The court having commenced hearing testimony on plaintiff's motion for a preliminary injunction, and it appearing that even the testimony appropriate on such a motion cannot be heard during the intervals of criminal

trials of defendants in custody, and the court finding that exceptional circumstances exist which require a reference to a Master . . . "

The date on which a report was requested was fixed so as to permit decision by the court before departure on its scheduled three weeks vacation, and later extended dates were fixed in the hope of permitting prompt action on the Magistrate's report after that period.

During the week of July 22, further hearings were held before Magistrate Catoggio. On July 25, 1974, a conference was held in chambers during which the defendants asked the court to extend the times fixed in the Order of Reference, so as to give the Magistrate further opportunity to study the case and also to let the parties file additional briefs. Over vigorous objection by the C.A.B., the court modified the Order of Reference, providing for further hearings during the period of the court's vacation, and allowing until September 3, 1974 for filing exceptions to the Report of the Special Master.

The Magistrate's Report as Special Master was filed on August 27, 1974, and stated (p. 12) that

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"[A]mple reason exists to suspect that flagrant and wide spread violations of the law designed to protect the American public have been committed in the recent past by "package tour companies. . . . "

The Magistrate found that the C.A.B. agent Minichiello had been sold illegal individual tickets for affinity charter flights by Eastern, Farragut, Carefree, and Nationwide, the last-named through Liberty Travel Agency; that memberships in spurious organizations were prepared for passengers on behalf of Ernie Pike Associates and Gil International; and that Surrey chartered one flight on behalf of the Knights of Pythias without any authorization. He refused to consider hearsay material in the C.A.B. affidavits. Although he found that all the remaining defendants except Snow and Kurz were guilty at one time or another of serious violations of C.A.B. regulations and statutes, he concluded that there was no adequate proof of present and systematic violations and that defendants could not be found to be indirect air carriers until the C.A.B. submitted further proof.

The Magistrate proposed that C.A.B. should investigate the authenticity of chartering organizations, require passengers to produce certificates of membership, and spot check these against the membership rolls, but that meanwhile the propriety

of a preliminary injunction was highly questionable.

In a supplemental report filed August 28, 1974, the Magistrate explained his refusal to pass on plaintiff's more detailed Proposed Findings, on the ground that they were complicated, argumentative, and generalized, and that plaintiff should have traced particular charters through the books of the travel agent, the airline and others involved in order to show that any defendant was conducting its business in violation of the law.

Argument on exceptions to the Magistrate's Report was heard on September 4, 1974. The C.A.B. exceptions were oral, but were based on the detailed Proposed Findings which had been submitted to the Magistrate.

Affinity Charter Flights

This case results from the effort of the C.A.B. to maintain a dual price structure, one price for tickets on regularly scheduled flights, and a lower price for charter flights. To prevent abuse of charter flights and protect the regular airline business, C.A.B. regulations, 14 C.F.R. parts 207, 208, 212, and 214, restrict affinity charter flights in

various ways. Three of the basic requirements are that for most purposes passengers on charter flights must be members of a bona fide organization, with membership dating back at least six months prior to the flight, that charter flights may be advertised only to group members and not to the general public, and that the cost of the charter flights must be pro-rated among the passengers. (If the flight is not full, those who fly must share the cost of the empty seats).

This case presents complex legal and factual issues of substantial importance to the public. The C.A.B. contends that the defendants are acting as indirect air carriers within the meaning of 49 U.S.C. § 1301(3) and therefore must obtain a certificate of public convenience and necessity as required by 49 U.S.C. § 1371(a). In addition, the C.A.B. contends that the defendants have consistently disregarded the requirements of the regulations and in effect sell individually ticketed transportation in the guise of charters, to persons who are not bona fide members of affinity groups, in violation of the intent of the U.S. Federal aviation program. See 1962/Code Cong. and Admin. News at 1852.

Defendants contend that they are not themselves offering air transportation except as legitimate ticket agents, 49 U.S.C. § 1301(34), that they are not indirect air carriers, and that any ticket sales in violation of the regulations were made to a C.A.B. investigator and were either unauthorized sales by unfaithful employees or the result of entrapment.

The C.A.B. regulations for affinity charter flights contemplated that there would be direct contracts between an air carrier holding a C.A.B. certificate of public convenience and necessity and a chartering organization or affinity group.

(In order not to discriminate against persons who are not members of organizations, provision was also made for independent groups of at least 40 or more - 14 C.F.R. § 207.11(c)). A travel agent may receive a 5 percent commission from the chartering airline, but no compensation from the chartering group. 14 C.F.R. §§ 207.23, 207.30.

The travel agent who handles a charter flight must execute Section A of Part II of a Statement of Supporting Information (S.S.I.) describing its services and warranting that it will act "in a manner consistent with Part 207 of the Board's economic regulations." 14 C.F.R. § 207.60. (Jan. 1,

1974 revision) p. 36. Part I of the S.S.I. is to be executed by the air carrier, and Section B of Part II by the chartering organization, with more detailed information and a more detailed warranty. 14 C.F.R. § 207.60. The charterer is required to state whether there has been any intermediary involved in the charter other than the travel agent and to warrant that it has not offered charter flights simultaneously with the solicitation of membership in the organization, and that all charter participants have been informed of the eligibility and cost requirements of the affinity charter rules.

Defendants (except Eastern, Surrey and their principals) act as wholesalers, a function which the C.A.B. says is wholly improper. They reserve space on airlines for a series of flights to a given destination, coordinate the air travel with hotel reservations, sightseeing tours, and other ground arrangements, and offer these packages to travel agents, ostensibly for sale by the travel agent only to bona fide chartering groups. A major issue of fact is whether the packages are used to solicit the general public, as distinguished from members of the chartering organization.

In affinity charter flights, as stated above, the charterer may solicit only bona fide members who have belonged to the organization for six months prior to the flight date, or their immediate families. 14 C.F.R. § 207.40(b). The six-months membership requirement is designed to prevent persons from joining an organization simply for the purpose of getting cheap air transportation; since this requirement can be evaded by back-dating memberships or by having a travel agent with blank membership cards, the central membership list must be available for inspection by the carrier or a C.A.B. representative. 14 C.F.R. § 207.41. The term "immediate family" is restricted to "spouse, dependent children, and parents" living in the member's household. 14 C.F.R. § 207.42. The air carrier is required to make reasonable efforts to verify the identity of all emplaning charter participants, and to note the documentary source of verification on the passenger list. 14 C.F.R. § 207.26.

Enforcement of the affinity charter rules has been difficult. The Director of the C.A.B. Bureau of Enforcement, William M. Gingery, testified that his investigation indicated that there were 37 percent or more of ineligible passengers on affinity charter flights. His first effort would be to

see that at least 90 percent of the passengers on a charter flight were eligible in accordance with the regulations.

Mr. Gingery admitted saying in an interview with the Travel Weekly Perspective in June 1974 that the carriers took upon themselves an obligation to warrant that the affinity passengers were being carried in accordance with Board regulations and that

We should exhaust the ability of the carriers to fulfill their responsibilities before we attempt to solve this problem by concluding that they are unequal to it."

Another requirement of affinity charters, as stated above, is to pro-rate the charter cost, including the chartering organization's reasonable administrative costs, among the passengers. 14 C.F.R. § 207.43. Passengers must be notified that their seat price is subject to increase or decrease depending on the number of participants. 14 C.F.R. § 207.44.

Facts

Affinity charter flights represent big business both for the defendants and for the airlines (both trunk carriers and supplemental carriers) who provide the planes. More than 12,000 passengers a week travel on affinity charters. The

defendants' commitments for charter hire, hotel rooms, and other ground arrangements run into millions of dollars, and extend six months or more ahead. For that reason, the court has permitted more extensive taking of proof than would often be appropriate in connection with a preliminary injunction.

In the preparation of its case, C.A.B. sent agent Minichiello to New York to make buys of individual tickets on charter flights from a number of organizations suspected of misconduct in the field, and to gather promotional material distributed by these organizations. Although the C.A.B. has authority to inspect and audit the books of travel agents, airlines, and charters, it did not furnish the detailed proof concerning particular flights which the Magistrate said would have been more persuasive. C.A.B. asserts that its manpower is limited, with only 87 on its investigation staff to enforce myriad regulations in far-flung locations, and that its proof is sufficient to show violations of law and to require the court to enjoin the defendants from further violations.

The court will deal with the facts in relation to separate organizations and individuals in the order in which they are listed in the caption of this decision.

The Carefree Group

Carefree Travel, Inc. and Vacation Ventures, Inc. are affiliated corporations, owned by a common parent. Defendant Doran Jacobs is a vice-president of both corporations and a stockholder of the parent, and acts on their behalf in respect of charter flights.

Carefree is one of the organizations which the Magistrate found sold an individual ticket on an affinity charter flight to C.A.B. agent Minichiello. This finding is not clearly erroneous; in fact, is well supported by the evidence and the Magistrate was not required to accept the excuse that the sale was unauthorized.

Vacation Ventures, Inc. contracted directly with Overseas National Airways (O.N.A.) by agreement dated May 9, 1974 for two flights a week by DC 8-21 aircraft with 179 seats from John F. Kennedy Airport to various destinations for a period of seven and one-half months at a fixed charter price, and deposited \$25,000 on the signature of the agreement. It agreed to reimburse O.N.A. for "ferry mileage" if any flight was cancelled within 45 days of its scheduled departure, and to pay \$500 per leg if two successive legs were cancelled on the same

day. The agreement stated that O.N.A. could rely conclusively on information from Vacation Ventures and the charterer concerning the eligibility of passengers and organizations. The agreement recited that O.N.A. recognized that Vacation Ventures "has as its clients numerous organizations and groups which are charterworthy."

Actually, the Carefree group did not have any substantial number of chartering groups as clients, but it prepared flyers listing airline package tours and circulated them to a large number of travel agents.

At the hearing of exceptions to the Magistrate's Report on September 4, 1974, counsel for O.N.A. asserted that the agreement with Vacation Ventures was cancelled as soon as it came to the attention of their legal department during these proceedings, but the details of the cancellation or of any substitute agreement were not added to the evidence in the case. Carefree has commitments for millions of dollars worth of airline space and hotel accommodations.

A branch manager of Liberty Travel testified that Carefree flyers were used in Liberty's individual travel department to provide cheap air travel for customers who came

in, without the necessity of the customer being a member of any affinity group. When Carefree's packages of travel documents were delivered to Liberty for its customers, they included a membership certificate for the customer as well as a boarding pass for the airplane. The executive vice-president of Liberty, William Parsons, stated in a deposition that his company dealt primarily with Carefree and Vacation Ventures on Las Vegas flights. The prices for air travel were not based on a pro-rata share of charter cost, but on a price fixed by Carefree for the package. On cross-examination by Mr. Nizer, he agreed with the statement made to a C.A.B. investigator by Liberty's president that "Liberty is more or less compelled to sell this type of transportation when a walk-in customer asks for it; otherwise the sale plus commission would go to a competitor." He regarded such individual sales as illegal but not immoral.

An investigation by Mr. Minichiello in May and June of 1974 indicated that 75 percent of the questionnaires mailed to passengers on manifests relating to Vacation Venture flights were returned by the United States Postal Service with the notation that there was no such addressee or no such address. He also found that 13 S.S.I.'s executed for flights where

Vacation Ventures, Inc. was the commissionable agent of record listed non-existent organizations. Doran Jacobs in an affidavit submitted on July 17, 1974 endeavored to explain these discrepancies by saying (1) that travel agents are reluctant to give the correct addresses of passengers because competing travel agents may obtain their names and addresses from the manifests and circulate them; (2) that Carefree had adopted a new policy last December of not accepting groups unless the individual addresses of members appeared to be correct; and (3) that the fictitious groups were all on flights by Modern Air Transport and that the flights had actually been taken by other unquestionably legitimate charter groups and the erroneous S.S.I.'s were signed by employees of Carefree. Later he filed copies of purported contracts with the legitimate groups. The Magistrate made no finding with respect to the bona fides of the error, and it is not necessary for the court to determine exactly how it took place.

Farragut

Jerome Lennard is chief executive of Farragut Holidays Corp. and acts on its behalf. He was once vice-president of Modern Air Transport. Farragut arranges charter flights,

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primarily to Athens and primarily by Saturn Airways, Inc. It has reserved aircraft on a prospective basis for charter trips which would cost in excess of \$2,000,000, and has committed itself for hotel space in Greece for approximately \$1,000,000 per year, with more than \$60,000 deposited on account of the reservations. It sells package tours to travel agents all over the United States, and has approximately 3800 on its list. Farragut is not authorized by ATC or IATA, but acts as travel agent on some flights and as a wholesale tour operator on others. Farragut executes the S.S.I. on flights where it acts as travel agent, but not on those where it acts as tour operator. Its business has shriveled since the Greek coup and the Cyprus hostilities. Farragut issued flyers to travel agents with a suggested price. The flyers did not refer to pro-rating, but all did contain the notation "Groups of 40 persons". Mr. Lennard understands that charter organizations are supposed to pro-rate the charter cost if a flight leaves with empty seats. He has lost money on flights that leave with a number of empty seats, but he insists that the loss was on the land part of the package, since the airline is paid in full 30 days in advance. If a flight is too light it will be cancelled.

Farragut handled one Ostend flight for a group

which turned out not to be charterworthy, but it asserts that it placed reasonable reliance on documents received from the group.

Early in 1974 Mr. Lennard was told by Saturn to make sure that Farragut should try to conduct their business as close to the regulations as possible, and Farragut has engaged two more employees, especially on documentation. He says that explanations are not necessary to travel agents to whom his flyers are sent. Farragut also owned stock in C.P.C. Travel, a retail travel agency, which used to have blank membership cards on hand for passengers before Farragut was organized in 1972, but this practice no longer obtains.

Nationwide

Nationwide Leisure Corporation markets packages of air transportation and land arrangements to travel agents. Stuart Graff is president of Nationwide and acts on its behalf in charter matters. Nationwide is the only defendant whose flyers refer to pro-rating of costs. In spite of this, Liberty used one of the Nationwide flyers to sell an individual ticket to Mr. Minichiello after a Nationwide employee refused to sell a cheap ticket and told him to see a travel agent.

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An employee of Nationwide submitted an affidavit challenging Mr. Minichiello's version of their conversation and asserting that Nationwide does not solicit members of the general public. No officer of Nationwide was tendered for examination by C.A.B. during the hearings before the Magistrate. Mr. Graff was out of the country at the time of the hearings before Magistrate Catoggio, and the other Nationwide officer who was requested to appear as a witness stated that he would invoke his Fifth Amendment privilege against self-incrimination.

C

The Gil, Pike, Surrey Group

Edward Gil is President of Gil International Tours, Ltd. and acts on its behalf in affinity charter matters. Ernie Pike and Henry Zetlin act on behalf of Ernie Pike Associates, Ltd., which is owned by Mr. Pike. Jack Gorcey and Esther Zetlin act on behalf of Surrey International Travel Inc. in affinity charter matters.

Gil markets air and land packages, primarily to Las Vegas and Hawaii, through travel agents. Pike provides the aircraft, with the aid of Surrey. Gil sets a fixed price for the package and receives a commission from the purchasers.

On one occasion during the TWA strike, Gil contracted directly with Royal Airline, a concern which operated without a safety certificate. Passengers on one of these flights were questioned by Paul Wallig, a field representative of the C.A.B. He interviewed approximately 25 to 30 out of 140 passengers, and only one couple recognized the name of the organization which Mr. Gil had described as the lessee of the plane. Mr. Wallig quoted Mr. Gil as having told him that if the Board regulations were enforced, he and all others in the Las Vegas market would be ruined because none of them complied with the regulations. Mr. Gil's version of the conversation was that he said it was common knowledge in the industry that if every charter flight was gone over with a fine tooth comb, not one would be 100 percent legal according to the Rules and Regulations. The Magistrate made no finding concerning which version was correct; it is sufficient for present purposes that Mr. Gil admitted that his flights do not comply with C.A.B. regulations. The affidavit of Bernard Burns, one of the C.A.B. investigators, showed that Gil on occasion sent membership cards as part of the documents on transportation packages sold through retailers.

Pike coordinates air arrangements with hotel reservations, bus tours, meals, sightseeing, and recreational activities.

Pike does not hold an authorization certificate for A.T.C. or I.A.T.A., so it has flights reserved through Surrey and sometimes through other travel agents. Commitments for air transportation as of July 1974 involved at least \$3,000,000, in addition to commitments of approximately \$750,000 to hotels in Las Vegas and Hawaii. Pike receives a commission from the retail travel agents based on the total price, although it asserts that the commission does not apply to the air portion, which must be paid in full in advance to the airlines. Much of Pike's business is handled through Gil and Liberty, but some also through other travel agents.

After the C.A.B. efforts to enforce affinity charter regulations became known, Pike retained C.A.B. counsel to advise it and added two employees; it now requires questionnaires from all chartering organizations. Pike no longer issues circulars in its own name. It places receipts in escrow accounts so that payment in full may be made to the airlines -- although it has no direct contracts with any airline. During the TWA strike Pike lost \$80,000 in arranging alternate transportation for passengers who had bought its package tours. Pike made some sales to individuals, but asserts that these are all members of chartering groups.

Surrey is authorized to act on behalf of A.T.C. and I.A.T.A. It makes commitments for transportation on airlines, particularly TWA and Pan Am, acts as travel agent of record, and receives a commission from the airline. It offers the committed space to Pike. Surrey frequently executes S.S.I.'s on the basis of information from Pike's office, but it is very rarely that Mr. Gorcey knows the charterer.

The S.S.I.'s omit any reference to Pike or Gil. Section B of Part II of the S.S.I., which is to be signed by the chartering organization, gave the answer "None" to Question 12:

"If there is any intermediary involved in the charter, other than the travel agent whose participation is described in Part II, Section A, submit the name, address, remuneration, and scope of activities: . . . "

Since January of 1974, TWA has required that an official of the chartering organization sign the S.S.I. in the presence of a TWA official. Surrey does not attempt to pro-rate the cost of passage, leaving that responsibility to the chartering organization.

Surrey has suffered the cancellation of several flights because of the pendency of this action. No passenger

has been stranded, and refunds have been made to any passenger who did not receive the transportation contracted for.

Eastern

Eastern Sportsmen's Club, Inc. is a not-for-profit corporation, organized in 1963. Gerald Kurtz and Irving Snow act on its behalf in affinity charter matters.

Eastern sells affinity charter packages offered by Carefree, Farragut, Nationwide, and Pike, among others. It sold a Las Vegas ticket to C.A.B. agent Minichiello after he had struck up a friendship with a female employee, who provided him with a membership card in Suburban Sportsmen's Club, the card having been obtained from the nearby Pike office. Inquiry during the flight by Mr. Minichiello indicated that most of those he questioned were in fact members of Suburban, and that Surrey was the agent of record with the airline.

Flyers concerning tour packages are available at the Eastern Office. The tour flyers describe the price, the dates, and the items included, but say nothing about any other activities of Eastern and nothing about pro-rating.

In response to C.A.B.'s request to have a knowledgeable official respond to questions before the Magistrate, Eastern supplied the director of social functions, who testified that they had given a free cocktail party at Toots Shor's, and that she mailed notices of general membership meetings and renewal notices. She could not tell the amounts spent on these events, and knew nothing about the arrangements for affinity flights.

The evidence is insufficient to show whether or not Eastern is a legitimate organization with any bona fide purpose except to provide cheap air transportation to "members." A substantial part of its business is with inclusive tour charters, which are subject to regulations different from those applicable to affinity charters.

General

No defendant has a certificate of public convenience and necessity to participate in air transportation.

No defendant owns any aircraft or assumes any responsibility for luggage or any liability for personal injuries. No defendant determines the time of departure or arrival of airplanes, supervises the personnel or maintenance of the planes, or fixes their routes.

The C.A.B. initiated administrative proceedings during the week of July 15, 1974 for partial cancellation of the certificates of convenience and necessity of British Caledonian Airlines, Overseas National Airways, and Saturn Airways for violation of the affinity charter regulations. Investigation of the major airlines began in March, 1974.

Public Interest Considerations

The C.A.B. emphasizes the public interest in requiring obedience to the statute and regulations. One of the purposes of restrictions on affinity charter flights is to prevent diversion of travel from the full price schedules of direct carriers and to protect the financial solvency of the airlines on which the general public depends for regular transportation.

Defendants emphasize the public interest in low-cost transportation. They assert also that affinity charter revenues are important to all direct air carriers and total hundreds of millions of dollars per year.

The C.A.B. witnesses admitted that illegal charters satisfy a public demand for low cost travel, especially since the phasing out of reduced family fares and youth fares.

Both sides recognize the public interest in seeing that passengers are not stranded abroad, and to a lesser extent that they are not forced to change vacation plans for which part or full payment has already been made.

The original form of injunction proposed by the C.A.B. called on the defendants to make refunds to passengers on cancelled flights and to provide return transportation to the United States for any passenger whose return charter flight was cancelled because of violation of the regulations. Such relief if many flights are cancelled, may not be financially practicable as is shown by the inability to the present date of Scottish-American Association to comply with the refund provisions of the consent decree which was signed by Judge Platt on August 2, 1974 after its charter flights had been cancelled.

Back-to-back charter flights are a practical necessity if affinity charter flights are to provide the maximum economy. Counsel for Overseas National Airlines pointed out, for instance, that there would be much empty "ferry mileage" unless an aircraft which delivered a charter group to a European destination had other charter groups to fly back to New York and still another charter group to return to the European

destination so that the aircraft could pick up the first charter when it had completed its tour.

Statute and Regulations

The statute defines air carrier in 49 U.S.C. § 1301(3)
as

"(3) 'Air carrier' means any citizen of the United States who undertakes, whether directly or indirectly or by a lease or any other arrangement, to engage in air transportation:
. . . . "(emphasis added)

Ticket agents are defined as follows:

"(34) 'Ticket agent' means any person, not an air carrier or a foreign air carrier and not a bona fide employee of an air carrier or foreign air carrier, who, as principal or agent, sells or offers for sale any air transportation, or negotiates for, or holds himself out by solicitation, advertisement, or otherwise as one who sells, provides, furnishes, contracts, or arranges for, such transportation."

The Civil Aeronautics Board is authorized by Section
1324(a)

" . . . to make and amend such general or special rules, regulations, and procedure . . . as it shall deem necessary to carry out the provisions of . . . this chapter."

The word "indirect" air carrier is not specifically defined in the statute, but represents an administrative and judicial shorthand for persons who indirectly participate in air transportation. Section 1301(3) authorizes the C.A.B. to exempt air carriers who are not directly engaged in the operation of aircraft from provisions of the chapter.

The basic regulation governing affinity charters is Part 207 of "Subchapter A - Economic Regulations" of 14 C.F.R. Chapter II - Civil Aeronautics Board. It defines a travel agent in Section 207.1 as follows:

"Travel agent' means any person engaged in the formation of groups for transportation or in the solicitation or sale of transportation services."

The applicability of the affinity charter regulation is specified in Section 207.2, which states:

"This part shall apply to all air carriers . . . who hold currently effective certificates of public convenience and necessity issued by the Board. . . ."

The regulation, however, imposes requirements on persons other than air carriers. As stated above, it calls upon the travel agent to sign one portion of the S.S.I. and on the chartering organization to fill in and sign another part, in addition to

the specific requirement of Section 207.24 that the carrier execute the S.S.I. before performing a charter flight.

Discussion of Law

For the completeness of the decision, it is necessary to summarize the reasons for denying defendants' various motions although the reasons were set forth orally during the July hearings.

1. The motion to dismiss for alleged misjoinder was denied because F.R.Civ.P. 21 expressly states that

"Misjoinder of parties is not ground for dismissal of an action . . . Any claim against a party may be severed and proceeded with separately."

This case is not like Nassau County Association of Insurance Agents, Inc. v. Aetna Life & Casualty Co., 497 F.2d 1151 (2d Cir. 1974), which defendants cite. That involved 164 different insurance companies with thousands of separate agency contracts. Here the same witnesses supplied information concerning several defendants. The development of the evidence has shown business relations among most of the defendants. At the present stage, there are only five groups of defendants involved in the motion for a preliminary injunction, and four

of them are represented by the same attorney.

2. Severance of claims against the separate defendants was not appropriate in view of the overlapping evidence. The waste of judicial time which would result from separate hearings is more serious than any prejudice to the defendants from having to listen to some testimony that may not affect them. If separate actions had been brought, it might have been desirable to consolidate them for hearing, as F.R.Civ.P. 42(a) permits.

3. The motion to add unspecified airlines as indispensable parties was a dilatory motion not supported by any pertinent authorities. Granting the motion would have been contrary to the express holding of the Court of Appeals decision in Civil Aeronautics Board v. Aeromatic Travel Corp., 489 F.2d 251 (2d Cir. 1973).

4. The motion for a jury trial of the issues was evidently made for the record, with no expectation of success at the district court level. Even if some issues merited a jury trial, the Court of Appeals has held, in a case cited by defendants, that the district court may first hear the application for a preliminary injunction and set the jury issues for trial at a later time. Heyman v. Kline, 456 F.2d 123,

130 (2d Cir. 1972).

5. The motion to certify to the Court of Appeals an appeal from the order denying defendants' motion to dismiss was a dilatory motion without any merit.

6. The motion to reassign the case to another judge was unjustified under Rule 2(d) of this court's Individual Assignment and Calendar Rules, which provide that assignment of cases as related is subject to correction "only by the judge to whom they have been assigned." A party has no right to determine the manner in which his case is assigned to a judge. United States v. Keane, 375 F. Supp. 1201, 1204 (N.D. Ill. 1974).

There is sufficient relation between this case and the Aeromatic case to avoid any charge of bad faith against the C.A.B. in describing it as a related case.

7. The motion to dismiss the second and third causes of action was based on the C.A.B. counsel's concession that the regulations in Parts 207, 208, 212, and 214 did not "by their terms" refer to the defendants. It does not follow that the defendants could conduct charter operations in defiance of the regulations. It is true that part 207 applies in terms primarily to air carriers. However, if a

contract between an airline and a chartering organization is subject to specific regulations, a defendant who takes part in conduct which violates those regulations should not be permitted to claim immunity from injunctive relief just because he does not have a license as an air carrier.

The complaint recites in count I that none of the defendants has a certificate of public convenience or necessity, that they act as independent entrepreneurs in buying and selling charter air transportation rather than as agents of direct air carriers, and that in so doing they are acting as indirect air carriers. Count II repeats each of the allegations in the earlier part of the complaint, and alleges that the defendants are acting in violation of their duty to comply with the C.A.B. regulations governing charter transportation.

Defendants assert that they are not subject to the chapter, that the regulations do not affect them, and therefore that their violation of the regulations may not be enjoined. For the reasons already stated, this argument is not persuasive. In any event, an additional justification for not dismissing Count II is that it incorporates all the allegations of Count I and adds specific details concerning

acts in violation of the C.A.B. regulations.

8. The C.A.B. objected to the court's referring the matter to a Magistrate, asserting that it was the policy of the Department of Justice to oppose such references. The reference, however, was made in accordance with the provisions of F.R.Civ.P. 53. Such a reference is the exception and not the rule in this court, and the C.A.B. did not challenge the fact that there were exceptional conditions in this case.

Service as a Special Master is one of the duties specifically authorized for United States Magistrates under 28 U.S.C. § 636 (b) (1). This court by order dated April 20, 1971 authorized Magistrates to perform all additional duties permitted by statute. General Rule 25.1.

The case is not controlled by Wingo v. Wedding, U.S. , 94 S.Ct. 2842 (1974), which denied the right of Magistrates to hold evidentiary hearings in habeas corpus matters. The Wingo case turned on the language of Revised Statute § 761 (28 U.S.C. § 461, 1940 ed.), which required that such a hearing be by the "court, or justice, or judge," (94 S.Ct. at 2846); and it also dealt with a local rule covering all habeas corpus cases and not with a reference in

an individual case.

Standards for the Issuance of
a Preliminary Injunction

No showing of irreparable injury is necessary in order to permit the C.A.B. to utilize its right to obtain an injunction under 49 U.S.C. § 1487. Civil Aeronautics Board v. Modern Air Transport, 81 F. Supp. 803, 806 (S.D.N.Y. 1949), aff'd, 179 F.2d 622 (2d Cir. 1950). All that need be shown is a reasonable probability of success on the merits. Long Island R.R. Co. v. New York Central R. Co., 135 F. Supp. 673, 677 (S.D.N.Y. 1950), aff'd, 231 F.2d 379 (2d Cir. 1950).

Public interest is a matter to be considered, as the defendants assert. United States v. Gressinger, 255 F. Supp. 328 (S.D. Fla. 1966); Securities and Exchange Comm. Harwyn Industries Corp., 326 F. Supp. 943, 955 (S.D.N.Y. 1971). It is also true that the court should hesitate to grant a preliminary injunction which would destroy a defendant's business. R.F.D. Group, Ltd. v. Rubber Fabricators, Inc., 323 F. Supp. 521, 528 (S.D.N.Y. 1971). The public interest, however, generally calls for enforcement of law. Here it calls for assessment of the relative public interest in cheap transportation and in regulation of minimum regular

fares, a determination which has been committed by Congress to the C.A.B. One gauge of the public interest is the statement that the legislative history of the Act manifests

[A] congressional intent that . . . the Board should . . . never permit "individually ticketed service to be offered to the general public under the guise of charter." Sen. Rep. No. 688, 87th Cong., 1st Sess., 13 (1961).

Saturn Airways, Inc. v. Civil Aeronautics Board, 483 F.2d 1284, 1288 (D.C. Cir. 1973).

The discriminatory nature of affinity charters, as asserted by defendants, is not a ground for denying an injunction. In fact, defendants' position is not advanced by the C.A.B. statement which they quote. The C.A.B. stated in a release announcing new regulations that existing charter rules "tended to discriminate against members of the public who did not belong to qualified organizations with a membership large enough to successfully mount a charter program." SPR-61, Sept. 27, 1973. The C.A.B. then undertook to cure this discrimination by providing travel group charter rules, so that any group of 40 can now obtain charter rates.

Sufficiency of Evidence to Support Preliminary Injunction

The time schedule which the court set for the

Magistrate to submit his report was insufficient to permit him to analyze the evidence other than individual sales to Mr. Minichiello by various defendants. The Magistrate found that most of the defendants had violated the regulations, but that the violations were not proved to be so systematic as to justify an injunction. Evidence on which he did not pass showed systematic violations, however.

The evidence of certain general business practices of the defendants was largely undisputed, a situation basically similar to that described by the Court of Appeals in the Aeromatic case. Much of the evidence consists of documents and of testimony of the defendants' officers and employees. It is basically a legal question whether the facts regarding the defendants' operations make them subject to the Board's power to regulate air carriers. The court may therefore read its own conclusions from the evidence. C.A.B. v. Aeromatic Travel Corp., supra, 489 F.2d 251, 254 (2d Cir. 1974).

The Magistrate's Report

The court confirms the Magistrate's findings of fact Nos. 1 through 8, inclusive, and his conclusions 2, 5, and 6.

With respect to conclusion No. 1, that hearsay affidavits may not be considered in connection with a preliminary injunction, the court finds that the proposition is too broadly stated. The Ninth Circuit has stated that

[A] preliminary injunction may be granted on affidavits.

Ross-Whitney Corp. v. Smith, Kline & French Laboratories, 207 F.2d 190, 193 (9th Cir. 1953). The authorities in this circuit permit the use of affidavits, with caution. Herbert Rosenthal Jewelry Corp. v. Crosshardt, 428 F.2d 551, 554 (2d Cir. 1970); Securities and Exchange Commission v. Frank, 388 F.2d 486 (2d Cir. 1968). The matter is discussed in 7 Moore's Federal Practice (2d ed. 1973) p. 65-61. The hearsay objections are not applicable with respect to the documents attached to the C.A.B.'s initial affidavits; these are proper for consideration with respect to the system of business utilized by the defendants.

For the same reason, the deposition of William R. Parsons, the executive vice-president of Liberty Travel, should have been considered as part of the evidence before the Magistrate. This is not an ex parte affidavit, but a deposition taken where cross-examination was had and where all parties had an opportunity to be represented. The

desirability of avoiding the duplication of time and effort necessary to produce Mr. Parsons in court constituted sufficient "exceptional circumstances" within the meaning of F.R.Civ.P. 32(a)(3)(F) to permit its introduction in evidence even if he was within 100 miles of New York at the time of the hearings before the Magistrate. Cf. Darawicki v. Pennsylvania R. Co., 353 F.2d 436 (3d Cir. 1965); Frederick v. Yellow Cab Co., 200 F.2d 483 (3d Cir. 1952).

The court is sympathetic with the Magistrate's Proposal (pp. 18-19) that it would have been preferable for the C.A.B. to make an in-depth investigation of the operation of a particular flight, but this does not support conclusions 3 and 4. The requirement that the C.A.B. proceed in a particular way is contrary to the Court of Appeals' decision in the Aeromatic case, which held that the issues should not be referred to the C.A.B. when it had decided to go to the district court for enforcement.

Particular Defendants

Carefree has offered air transportation for sale after contracting for it with O.N.A. It has sold air transportation to affinity charter groups and to individual members of the general public and has issued circulars which

facilitated the illegal individual sales of passage on affinity charter flights to persons who had not been members of the chartering organizations for six months. Carefree made no provision for pro-rating the charter cost among passengers in its published circulars, therefore it was indirectly undertaking to engage in air transportation "by a lease or any other arrangement" in violation of 49 U.S.C. § 1301(3), and was aiding in potential violation of the affinity charter regulations.

Concerning Eastern, the evidence is not sufficient to show that it was selling to non-members or new members or failing to pro-rate the cost when appropriate. The single sale to Minichiello is sufficiently atypical that it may not serve as the basis of an injunction. The C.A.B. may present additional evidence in the future if it becomes available.

The C.A.B. argues that Eastern is in violation for another reason, that it may not charter planes for its own members as long as it also provides ITC tours for its members. The C.A.B. bases this contention on the provisions of Section 207.11 of the regulations, which specify:

Charter flights (trips) in air transportation shall be limited to the following:
... (b) Air transportation ... where the entire capacity of one or more aircraft has been engaged ...

(2) By a person (no part of whose business is the formation of groups or the consolidation of shipments for transportation or the solicitation or sale of transportation services) for the transportation of a group of persons, as agent or representative of such group: (Emphasis added).

The meaning of this language is somewhat cloudy. Perhaps it means that even a bona fide organization, not formed specifically for the obtaining of cheap transportation, is forbidden to give its members a choice between charter flights and independent travel groups.

At this stage, on consideration of a preliminary injunction, the court is not prepared to state that such an interpretation is the only reasonable one.

Eastern Exhibits 9 and 15, which have package tour announcements on the front and applications for new membership on the back, as well as renewal notices, may violate Reg. 207.40, but the precise point was not briefed, and will not be regarded as a basis for an injunction at this point.

Farragut's operations fall somewhere between those of Carefree and those of Nationwide, on the present record. While Farragut's flyers refer to groups of 40, they do not specify the restrictions on affinity charter groups or the requirement of pro-rating costs of the plane charter. Farragut's practices should be brought into conformity with those

required by the limited injunction described below.

Nationwide is the only defendant whose literature generally refers to the fact that prices must be pro-rated. It wholesales air and land packages and has offered the combination through various travel agents. The evidence is insufficient to show that it has violated or facilitated the violation of the affinity charter regulations.

The Gil-Pike-Surrey group involves a division of responsibility, which encourages widespread violation of the affinity charter restrictions. Gil is an agent or representative of Pike under 49 U.S.C. § 1437(a), and both of them are intermediaries between Surrey and the chartering organizations. All three should bear some responsibility for the false warranties by charterers (e.g. Exs. 5, 8, 9, and 10 to Paul W. Wallig's affidavit of June 4, 1974) that there was no intermediary between Surrey and the chartering organization.

Wholesaling

C.A.B. argues that the mere fact of being a wholesaler makes one an indirect air carrier in the light of the regulation describing to operators as indirect air carriers

Outlawing all wholesalers would seriously affect the economics of affinity charter flights, for the reasons described earlier in this memorandum. So long as the wholesaler is not a party to facilitating violation of the basic restrictions on affinity charter flights, or to offering such flights to the general public without regard to six months membership in chartering organizations or to membership in independent groups of 40, the court believes it is against the public interest to issue a preliminary injunction. It will be open to the C.A.B. after full hearing and further briefing to argue that wholesaling is indeed contrary to the purpose of the C.A.B. regulations, but at this point it appears that equity would not be served by such a basic change in the affinity charter business until there has been full consideration of the matter.

The requirement that the chartering organization state in Part B of Section II of the S.S.I., whether there has been any intermediary except the travel agent, may in fact be consistent with activities of wholesalers. In any event, an injunction may be so framed as to reach both wholesalers and retailers and compel their compliance with the regulations.

Public Interest

The court concludes that the public interest factors described earlier preponderate on the side of enforcing the law. In addition, the court is not convinced that an injunction against violation of the regulations will put any defendant out of business. On the contrary, clarification of the defendants' obligations by an injunction may well protect them against hasty cancellation of flights by airlines which are fearful of penalties for violating the affinity charter regulations.

Indirect Air Carriers

Concerning C.A.B.'s request to find that the defendants are indirect air carriers, the court interprets the phrase to mean no more than that, without a certificate of convenience and necessity, the defendants are undertaking to do things which a certificated carrier would be forbidden to do.

The concept of an "indirect air carrier" began in Railway Express Agency, Grandfather Certificate, 2 C.A.B. 531 (1941), where the C.A.B. held that Railway Express Agency, which assembled air express for shipment by air, was an

indirect air carrier as "an intermediary between the shipper and the ultimate operator of the aircraft in which the shipment is carried." (pp. 536-37).

The doctrine has evolved to the point where even a restaurant which operates within an airport may be treated as an indirect air carrier. See United States v. City of Montgomery, 201 F. Supp. 590, 593 (M.D. Ala. 1962), holding that even if the defendants are not air carriers, they are governed by the non-discriminatory provisions of the Federal Aviation Act. Other cases are exemplified by Las Vegas Hacienda, Inc. v. Civil Aeronautics Board, 293 F.2d 430 (9th Cir. 1962), dealing with a hotel which included plane rides in its own planes as part of package tours; M. & R. Investment Co., Inc. v. Civil Aeronautics Board, 308 F.2d 49 (9th Cir. 1962), where package tours included flights in planes under contract with the plaintiff's hotel; Civil Aeronautics Board v. International Exchange School, 357 F. Supp. 819 (D. Utah 1973), where a tour operator failed to comply with the regulations; Monarch Travel Service, Inc. v. Associated Cultural Clubs, Inc., 466 F.2d 532 (9th Cir. 1972), cert. denied, 410 U.S. 967, 93 S.Ct. 1444 (1973), dealing with a club which chartered planes and sold package tours to the

general public; and Travel Agents Malpractice Action Group v. Regal Cultural Society, 118 N.J. Super 184, 287 A.2d 4 (1972), where a purported cultural society had no bona fide purpose except out-rate air travel. These cases are not identical with the present case, but the variety of situations shows that there are no rigid requirements for being an indirect air carrier, as defendants assert. On the contrary, the cases illustrate the extent to which courts have sustained efforts to prevent the evasion of the Act and C.A.B. regulations by uncertificated persons.

The Court of Appeals in the Aeromatic case described the activities charged here as being similar to those which were enjoined in the Monarch case. See Civil Aeronautics Board v. Aeromatic Travel Corp., 489 F.2d at 254, n.8.

Nor are defendants helped by the assertion that those who are retail travel agents are obligated only to refrain from collecting double commissions or making donations to affinity organizations. Anyone who facilitates the evasion of the regulations should be subject to the power of a court of equity to enjoin.

The concept that persons other than those to whom

a statute or rule applies may be responsible for assisting in its violation is not an unusual one. In addition to the criminal law concept in 18 U.S.C. § 2 that anyone who assists in a violation of a statute is guilty as a principal, the provisions of F.R.Civ.P. 65(d) concerning an injunction make it binding "upon those persons in active concert or participation with them who receive actual notice of the order...." A wholesaler who steps between the carrier, the travel agent and the charterer is acting in concert and should be required not to violate the affinity charter rules. It seems clear from the entire record that all the defendants are aware of the provisions of the affinity charter regulations. Travel agencies which participate with a carrier may also be enjoined if operations violate the law. World Airways, Inc. v. Northeast Airlines, Inc., 349 F.2d 1007, 1010 (1st Cir. 1965), cert. denied, 382 U.S. 984, 86 S.Ct. 561 (1966).

Analysis of the cases shows that the term "indirect air carrier" is used in connection with two different categories. A person without a certificate who undertakes to do what only a certificated carrier or its authorized agent can do is violating the statute and is described as an "indirect air carrier" simply for want of a better term. In the second

category, a person without a certificate who attempts to do something in connection with air transportation which a certificated air carrier would be expressly forbidden to do is an "indirect air carrier" in the sense that he is attempting to usurp some of the functions of an air carrier without the responsibilities of such a carrier.

In Saturn Airways, Inc. v. Civil Aeronautics Board, supra, 483 F.2d at 1287, Judge Tamm stated:

In the past decade the Board has responded to the challenge in a painstaking, almost evolutionary process of developing comprehensive regulations which authorize various types of charter flights.

Defendants' contention in these cases would permit widespread evasion of the C.A.B. charter flight regulations by creating a no-man's land where defendants neither require certificates of convenience and necessity nor can be required to abide by the regulations.

Defendants' reading of the statute would have the odd result of applying the affinity charter rules only to persons with certificates of convenience and necessity and permitting those without such certificates to violate rules with impunity.

Correction of Practices

Carefree, Farragut, and Pike have all taken some steps during 1974 to avoid further violations of the regulations. In a suit by a regulatory agency, such corrective measures do not defeat the right to an injunction. There is still enough possibility of future violations to require court intervention so that prolonged litigation will not then be required.

The rule is succinctly stated in Atlantic Richfield Co. v. Oil, Chemical and Atomic Workers International Union, 447 F.2d 945, 947 (7th Cir. 1971):

If past wrongs have been proved, and the possibility of future misconduct survives, so does the court's power.

A per curiam decision of this circuit in Securities and Exchange Commission v. Boren, 283 F.2d 312, 313 (2d Cir. 1960), states the same rule:

[T]he cases are clear that a cessation of the alleged objectionable activities by the defendant in contemplation of an SEC suit will not defeat the district court's power to grant an injunction restraining continued activity.

Mr. Justice Clark in United States v. W.T. Grant Co., 345 U.S. 629, 633, 73 S.Ct. 894, 897, acknowledged that a suit for

injunction may be moot if the defendant can demonstrate that there is no reasonable expectation that the wrong will be repeated, but he stated, "The burden is a heavy one."

Defendants here have not met the burden of showing that the court should exercise its discretion to deny a preliminary injunction because of their corrective efforts.

The granting of a preliminary injunction as to some defendants and its denial as to others will not prevent C.A.B. from continuing through depositions, interrogatories, or its own investigatory machinery to ascertain more facts concerning violation of the affinity charter regulations by any of the defendants or any other parties.

Other Issues

Defendants' attack on the affinity charter regulations as discriminatory does not prevent their enforcement. The District of Columbia Circuit noted in approving the C.A.B.'s authorization of travel group charters that one of the purposes was to minimize any discrimination resulting from the affinity charter rules. Saturn Airways, Inc. v. Civil Aeronautics Board, supra, 483 F.2d at 1292. Earlier, (then) Judge Burger had stated for the same Court in American

Airlines v. Civil Aeronautics Board, 348 F.2d 349, 354

(D.C. Cir. 1965):

A prime concern of Congress was to maintain the integrity of the charter concept - to preserve the distinction between group and individually ticketed travel; within these limits it is for the Board to evolve reasonable definitions.

The failure of C.A.B. to institute proceedings against Liberty Travel Corp. is a matter of prosecutorial discretion and not a defense to the action against the parties before the court. The strict limits on the defense of selective prosecution have recently been outlined by the Court of Appeals in United States v. Larries, F.2d (2d Cir. August 8, 1974).

The American Society of Travel Agents, Inc. filed on September 12, 1974 an application for leave to participate as amicus curiae in support of the requested injunction, asserting that defendants were placing legitimate travel agencies at a competitive disadvantage by ignoring the affinity charter restrictions. This Memorandum of Decision was drafted before that application was considered, and may make the application moot. The application is denied without prejudice to later renewal. As far as concerns the grant of immunity to officials of Liberty Travel, this is a common

method of obtaining evidence and no reason to deny an appropriate injunction.

The general rule does not permit defending by the assertion that someone else is also violating a regulation. There is no exception to this rule in Universal-Rundle Corp. v. Federal Trade Commission, 352 F.2d 831 (7th Cir. 1965), rev'd, 387 U.S. 244, 87 S.Ct. 1622 (1967), which defendants cite. There the F.T.C. attacked only one member of an industry, with the lowest share of the market, but the Supreme Court said that the Court of Appeals should not have refused enforcement. Here defendants have claimed not only discrimination, but contrariwise that too many alleged violators are being sued together.

Defendants also assert that new rule-making proposals filed by the Airline Charter Tour Operators Association, Docket 26640, and by Member Carriers of the National Air Carrier Association, Docket , are now under consideration by the C.A.B. and may change the affinity charter regulations; but the existing regulations must be obeyed while they are in force.

Nor is enforcement against these defendants barred by the fact that air carriers are responsible for verifying

the compliance of chartering organizations. The C.A.B. under Aeromatic may use every enforcement power which Congress has given it.

Forms of Relief

The type of advertising utilized by most of the defendants offers a temptation to retail travel agents to sell package tours on affinity charter flights to ineligible individuals.

An appropriate corrective step is to enjoin the use of existing materials, and require the withdrawal of all existing flyers or descriptions of tours by the defendants mentioned above within twenty days after the order is entered, and to enjoin them from using any other publicity material which does not state (1) in readable print that the circular and the tour are intended only for persons who have been bona fide members of a chartering organization for six months or members of an authorized group of 40 persons and also (2) that the air travel portion of the tour price is subject to change if there are empty seats on the plane so that the cost can be pro-rated among the members of the chartering organization.

If there is an intermediary between the charter agent and the air carrier other than the travel agent of record, then each intermediary should be required to execute a warranty similar to that in Part A of Section II of the S.S.I. and affix it to the S.S.I. in the form of an allonge. The travel agent of record should be responsible for seeing that the intermediaries execute such a warranty and for checking the charterer's section of the S.S.I., to ascertain that it does in fact indicate compliance with the affinity charter regulations. (The travel agent of record should know what intermediaries there are and who is the charterer).

A general prohibition against acting as an indirect air carrier, as requested by C.A.B., is too vague for proper inclusion in a preliminary injunction.

Inasmuch as none of the defendants remaining to be considered on this motion have stranded any passengers or been obligated to make any refunds, it is not appropriate to include a refund clause in the injunction at this time.

Since the injunction order should be self-contained, and capable of distribution to all those who are required to conform, it should be a separate document from this Memorandum of Decision. The plaintiff should prepare a form of injunction

not confined to the precise language of this Memorandum, and settle it on 48 hours notice (not including week-ends).

The injunctions should be directed against Carefree Travel, Inc., Vacation Ventures, Inc., Doran Jacobs, Farragut Holidays Corp., Jerome H. Lennard, Surrey International Travel, Inc., Esther Zetlin, Jack Corcey, Ernie Pike Associates, Ltd., Ernie Pike, Henry Zetlin, Gil International Tours, Ltd., and Edward Gil. For the present no injunction will issue against Nationwide Leisure Corp., Stuart Graff, Eastern Sportsmen's Club, Inc., Gerald Kurtz, Irving Snow, or Henry Shapiro.



U. S. D. C.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

-----x	
CIVIL AERONAUTICS BOARD,	:
	:
Plaintiff,	:
	:
- against -	: No. 74 C 915
	:
CAREFREE TRAVEL, INC., VACATION	:
VENTURES, INC. and DORAN JACOBS;	:
	:
FARRAGUT HOLIDAYS CORP. and JEROME	:
H. LENNARD;	: AMENDED
	: <u>PRELIMINARY INJUNCTION</u>
	:
SURREY INTERNATIONAL TRAVEL INC.,	:
ESTHER ZETLIN and JACK GORCEY;	:
	:
ERNIE PIKE ASSOCIATES, LTD., ERNIE	:
PIKE, and HENRY ZETLIN;	:
	:
GIL INTERNATIONAL TOURS, LTD. and	:
EDWARD GIL,	:
	:
Defendants.	:
-----x	

This action came on for consideration by the Court on plaintiff's application for a preliminary injunction. The Court, having considered the evidence and all other pleadings and proceedings herein, issued a memorandum of decision on September 30, 1974 ("decision"). The Court having concluded that the defendants named below are acting in a manner inconsistent with the Civil Aeronautics Board (CAB) regulations applicable to affinity charter flights, 14 C.F.R. 207, 208, 212 and 214, that "an injunction may be framed as to reach both wholesalers and retailers and compel their compliance with the

regulations" (decision at 46), and that "[a]nyone who facilitates the evasion of the regulations should be subject to the power of a court of equity to enjoin" (decision at 49), it is hereby:

ORDERED, ADJUDGED and DECREED that defendants Carefree Travel, Inc., Vacation Ventures, Inc., Doran Jacobs, Farragut Holidays Corp., Jerome H. Lennard, Surrey International Travel, Inc., Esther Zetlin, Jack Gorcey, Ernie Pike Associates, Ltd., Ernie Pike, Henry Zetlin, Gil International Tours, Ltd., and Edward Gil, and each of them, their officers, agents, servants, employees, and attorneys, and those persons in active concert or participation with them who receive actual notice of this order by personal service or otherwise, are hereby enjoined, prohibited, and restrained from:

1. Failing to withdraw from use or circulation, within ^{fourteen} ~~twenty~~ days of this date, all existing publicity material, flyers or descriptions of tours involving affinity charter air transportation, which does not comply with the requirements of paragraph 2 below. This withdrawal shall be accomplished by notifying, in writing, each and every person or organization, including but not limited to retail travel agencies, travel tour operators, businesses and chartering organizations, to whom any defendant has sent solicitation material, either directly in defendant's own name or indirectly in some other name, of the fact that such earlier solicitations are withdrawn and shall no longer be utilized. Such notification, in writing, shall

explain that this withdrawal is being performed pursuant to this Order.

2. Utilizing any solicitation material of any kind involving affinity charter air transportation, including but not limited to publicity materials or flyers or descriptions of tours, unless such solicitation material states in clearly readable print:

(a) that such material and such affinity charter air transportation are intended for and limited to persons who have been bona fide members of an eligible chartering organization for six months, or to members of a group of at least 40 persons (including their immediate families) authorized by CAB regulations to contract for affinity charter flights;

(b) that the price per person of affinity charter transportation, or, where involving an affinity charter transportation tour package, the price of the air transportation portion of the total tour price (such price to be separately stated in readable print), shall be subject to increase or decrease depending upon the number of seats sold, and shall constitute a pro rated portion of the total charter cost;

and provided that the content of such solicitation materials is not used in any manner to solicit individuals (through personal contact, through advertising, or otherwise), as distinguished from the solicitation of an organization for a charter trip,

except after a charter contract has been signed with a direct air carrier.

3. Directly or indirectly participating in the arrangement or sale of affinity charter air transportation which transportation is arranged, constituted, solicited, sold or paid for in a manner inconsistent with the provisions required by paragraph 2 above to be stated on the solicitation material therein referred to.

4. Directly or indirectly participating in the arrangement or sale of affinity charter air transportation in any manner except in accordance with subparagraphs (a) or (b) below:

(a) as an authorized, commissioned agent of a direct air carrier (and therefore a "travel agent" of record within the meaning of 14 C.F.R. 207.31, 208.204, 212.31 and 214.22) for the purpose of perfecting air transportation arrangements between such direct air carrier and an eligible chartering organization, Provided, that where acting as such an agent, defendant shall be responsible for and shall:

(i) fully and accurately execute Part II, Section A, of the Statement of Supporting Information (S.S.I.) required by CAB regulations;

(ii) assure that the chartering organization has executed and has filed with the direct air carrier Section B of Part II of the S.S.I. as

required by 14 C.F.R. §§ 207.47, 208.217, 212.47, and 214.37; and that Section B of Part II of the S.S.I. as executed indicates compliance by the charterer with the applicable affinity charter regulations; and

(iii) assure that any other intermediary acting with respect to such charter has executed the warranty attached hereto as Appendix A (which warranty shall be affixed to the S.S.I. as an allonge);

(b) as an intermediary with respect to such flight, Provided, that where acting as such intermediary each defendant shall:

(i) fully and accurately execute a warranty in the form attached hereto as Appendix A and incorporated herein by this reference (which warranty shall be affixed to the S.S.I. as an allonge); and

(ii) assure that every other intermediary acting with respect to the same affinity charter air transportation fully and accurately executes the warranty attached hereto as Appendix A (which warranty shall be affixed to the S.S.I. as an allonge).

5. Directly or indirectly participating in the arrangement or sale of affinity charter air transportation which

JA-90

transportation defendant knows or has reason to know is arranged, constituted, solicited, sold or paid for in a manner inconsistent with the representations made on the warranties required by paragraphs 4(a) or 4(b) above or the representations made on the S.S.I.


6. Entering into any contract requiring any performance in violation of, or performing any contract so as to violate, the prohibitions of paragraphs 1 through 5 above.

7. The provisions of this Order shall be effective immediately, except for paragraph 2 which shall become effective within ¹⁰~~10~~ days of this date.

It is so ORDERED.

Dated this 15th day of October, 1974.

Brooklyn, New York


ORRIN GOOD
United States District Judge

A TRUE COPY
ATTEST
DATED Oct. 15 1974
LEWIS ORGEL
BY F. Jones CLERK
DEPUTY CLERK

ONLY COPY AVAILABLE

1. What specific services have been or will be provided by intermediary to charterer on a group basis?

2. What specific services have been or will be provided by intermediary to individual participants in the proposed charter?

3. If there is any other intermediary involved in the charter, other than the travel agent whose participation is described in Part II, Section A, of the Statement of Supporting Information, submit name, address and scope of activity to the extent known:

4. Has the intermediary or, to his knowledge, have any of its principals, officers, directors, associates or employees compensated any members of the chartering organization in relation either to the proposed charter flight or to any land tour?
Yes () No ()

5. Does the intermediary have any financial interest in any organization rendering services to the chartering organization?
Yes () No () If answer is "yes" explain:

WARRANTY

I, _____ represent and warrant
(typed or printed name)
that I have acted with regard to this charter operation (except to the extent fully and specifically explained in this warranty) and will act with regard to such operation, in a manner consistent with Parts 207, 208, 212 and 214 of the Board's economic regulations.

(Date)

(Signature and name of signatory and address of intermediary)

APPENDIX A

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